Supreme Court, U.S.
FILED
JUN 4 2003
OFFICE OF THE CLERK

No. 02-1464

In the Supreme Court of the United States

GEORGE E. SNYDER, WARDEN, PETITIONER

v.

MARIO ROSALES-GARCIA

RANDY J. DAVIS, WARDEN, AND BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, PETITIONERS

v.

REYNERO ARTEAGA CARBALLO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13 pp

TABLE OF AUTHORITIES

Cases:	Page
Borrero v. *Aljets*, 325 F.3d 1003 (8th Cir. 2003)	2
Mt. Healthy City Sch. Dist. Bd. of Educ. v. *Doyle*, 429 U.S. 274 (1977)	4
National Park Hospitality Ass'n v. *Department of the Interior*, No. 02-196 (May 27, 2003)	7
Owasso Indep. Sch. Dist. No. I-011 v. *Falvo*, 534 U.S. 426 (2002)	4
Rios v. *INS*, 324 F.3d 296 (5th Cir. 2003)	3
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953)	2, 8
United States v. *Mendoza-Lopez*, 481 U.S. 828 (1987)	4
Xi v. *INS*, 298 F.3d 832 (9th Cir. 2002)	2
Zadvydas v. *Davis*, 533 U.S. 678 (2001)	1, 4, 8, 9, 10
Zadvydas v. *Underdown*, 185 F.3d 279 (5th Cir. 1999)	4
Statutes, regulations and rule:	
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546	3
8 U.S.C. 1182(d)(5)(A)	4
8 U.S.C. 1226(e) (1994)	3, 4, 5
8 U.S.C. 1226(e)(3)(c) (1994)	5
8 U.S.C. 1226a	10
8 U.S.C. 1226a(a)(6)	10
8 U.S.C. 1231(a)	10
8 U.S.C. 1231(a)(6)	4, 5, 8, 9, 10
42 U.S.C. 1983	4

Regulations and rule—Continued:	Page
8 C.F.R.:	
Section 212.12	6, 7, 10
Section 212.12(d)(2)	8
Section 241.4	7
Section 241.4(e)	8
Section 241.13	8
Section 241.13(b)(3)(i)	9
Sup. Ct. R. 25.5	7
Miscellaneous:	
66 Fed. Reg. 56,969 (2001)	9

In the Supreme Court of the United States

No. 02-1464

GEORGE E. SNYDER, WARDEN, PETITIONER

v.

MARIO ROSALES-GARCIA

RANDY J. DAVIS, WARDEN, AND BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, PETITIONERS

v.

REYNERO ARTEAGA CARBALLO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The Sixth Circuit's decision in these consolidated cases incorrectly extends the presumptive six-month limitation of *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), which defines the reasonable period of post-final-order detention of an alien who previously was admitted for lawful permanent residence, to the detention of aliens who were stopped at the border while attempting to enter the United States illegally. That ruling implausibly attributes to Congress an intent to alter radically the principles that long have governed the discretionary detention and parole of such aliens, including approximately 125,000 Mariel Cubans who were stopped at the border in 1980—all without the slightest suggestion in ei-

ther the text or the legislative history of the 1996 immigration amendments that Congress intended that result.

The Sixth Circuit's erroneous extension of *Zadvydas* deepens a circuit split and opens a "back door" into the United States for aliens from countries, such as Cuba, that do not cooperate, or interpose delay, in the repatriation of their nationals. See Pet. 19-28. In addition, the Sixth Circuit made a far-reaching error of constitutional law when it determined that *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953)—which rejected a due process challenge to the ongoing detention of an alien who unsuccessfully sought entry into the United States but could not be removed to another country—is no longer good law. See Pet. 28-29. Certiorari is warranted for those reasons.

1. a Since the filing of the petition, the Eighth Circuit has upheld the ongoing immigration detention of a Mariel Cuban, thus deepening the circuit split described in the petition. See Pet. 19-21. In *Borrero* v. *Aljets*, 325 F.3d 1003 (2003), the Eighth Circuit concluded, in express disagreement with the Sixth Circuit's decision in these cases and the Ninth Circuit's decision in *Xi* v. *INS*, 298 F.3d 832 (2002), that *Zadvydas* "limit[s] the detention of only those aliens whose detention raises serious constitutional doubt—admitted aliens." 325 F.3d at 1007. Also in conflict with the Sixth Circuit, see Pet. App. 43a-52a, the Eighth Circuit rejected the argument that "if [8 U.S.C.] 1231(a)(6) authorizes indefinite detention of inadmissible aliens, it is unconstitutional under the Due Process Clause of the Fifth Amendment." 325 F.3d at 1007. Unlike the Sixth Circuit, which deems *Mezei* to be "eclipsed" (Pet. App. 50a) and "fatally undermined" (*id.* at 52a) by later decisions of this Court, the Eighth Circuit correctly recognized that *Mezei* has been "neither overruled nor undermined." 325 F.3d at 1007.

b. Respondents suggest (Br. in Opp. 16) that the Eighth Circuit might grant rehearing en banc to reconsider its deci-

sion in *Borrero*. If the alien's petition for rehearing en banc in *Borrero* were granted, that would only serve to highlight the importance of the issues presented by the instant petition for certiorari. Indeed, Borrero's argument in his pending en banc petition is that the application of *Zadvydas* to the detention of aliens who have been stopped at the border, but who cannot be removed, involves "vitally important issues" on which the courts of appeals are divided. Pet. for Reh'g and Suggestion for Reh'g En Banc at 14, *Borrero* v. *Aljets*, No. 02-1506 (8th Cir. filed May 30, 2003).

Furthermore, even if the en banc Eighth Circuit were to disagree with the panel decision and require Borrero's release, a circuit conflict still would exist in light of *Rios* v. *INS*, 324 F.3d 296 (5th Cir. 2003) (per curiam). See Pet. 19-20. Respondents are mistaken when they assert (Br. in Opp. 15) that *Rios* involved only a constitutional challenge to detention, and not the question of *Zadvydas*'s application to a Mariel Cuban. To the contrary, Rios argued in the Fifth Circuit that his immigration detention violated both the "Constitution of the United States, and the Supreme Court [d]ecision in *Zadvydas* v. *Davis*." Appellant's Br. at 1, *Rios* v. *INS*, No. 02-40766 (5th Cir. filed July 1, 2002). Rios specifically contended that Mariel Cubans "are entitled to consideration for release from indefinite detention * * * in accordance with the provisions of the detention statutes and the holding of the Court in *Zadvydas*." *Id.* at 21. In direct conflict with the Sixth and Ninth Circuits, the Fifth Circuit rejected Rios's challenges to his detention. 324 F.3d at 297.

2. Respondents argue (Br. in Opp. 7) that "this case is an inappropriate vehicle for considering" the questions on which the circuits disagree because the government argued below that respondents' detention is authorized by 8 U.S.C. 1226(e) (1994), and that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, which enacted current Section

1231(a)(6), does not apply to respondents. The court of appeals rejected the government's contention. See Pet. App. 23a-28a. Respondents' submission is that even though the certiorari petition expressly does not present that question, see Pet. 19 n.4, the Court "would need to consider and resolve" it to decide this case. Br. in Opp. 10. Respondents again are mistaken.

a. As explained in the petition (at 3-4, 25-26), the parole provisions of 8 U.S.C. 1182(d)(5)(A) furnish independent authority, quite apart from either 8 U.S.C. 1226(e) (1994) *or* 8 U.S.C. 1231(a)(6), to detain an alien who has been stopped at the border. Respondents offer no answer to, and indeed do not even mention, that statutory basis for their detention.

b. In any event, this Court routinely decides cases on the assumption that a court of appeals correctly decided a question on which the Court did not grant certiorari. See, *e.g.*, *Owasso Indep. Sch. Dist. No. I-011* v. *Falvo*, 534 U.S. 426, 430-431 (2002) (assuming existence of cause of action under 42 U.S.C. 1983); *United States* v. *Mendoza-Lopez*, 481 U.S. 828, 832, 839-840 (1987) (assuming due process violation); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 279 (1977) (stating that answers to non-jurisdictional statutory questions may be assumed, without need for resolution by this Court). The Court in *Zadvydas* proceeded on the premise (with which both parties there agreed) that Section 1231(a)(6) applied to a lawful permanent resident alien who was ordered deported in 1994, see 533 U.S. at 684, 688, even though the court of appeals had considered and rejected other possibilities as well, see *Zadvydas* v. *Underdown*, 185 F.3d 279, 286-287 (5th Cir. 1999). The Court similarly may proceed on the basis of the court of appeals' determination in this case that Section 1231(a)(6) applies.

If this Court assumes that the court of appeals was correct about the applicability of Section 1231(a)(6), but reverses the judgment of the court of appeals and upholds re-

spondents' detention, that disposition should effectively moot controversies about whether former Section 1226(e), or current Section 1231(a)(6), applies to aliens who were placed in exclusion proceedings before the April 1, 1997, effective date of IIRIRA. Respondents never have suggested any theory under which they could prevail under former Section 1226(e) if they lose under Section 1231(a)(6), and, as explained below, the text of Section 1226(e) would foreclose such a result. Accordingly, by assuming that Section 1231(a)(6) applies and reversing the judgment of the Sixth Circuit on the basis of that assumption (which is relatively disadvantageous to the government), this Court can effectively resolve the detention issue affecting excludable and inadmissible aliens that has divided the courts of appeals, regardless of whether a particular alien's detention is governed by pre-IIRIRA or post-IIRIRA law.

c. Although the government has not presented the effective-date issue and does not intend to do so if certiorari is granted, the importance of these cases would not be diminished if the Court nevertheless chose to address that issue sua sponte and decided that former Section 1226(e) applies to respondents' detention. In that situation, respondents' continued detention would be *required* by statute unless an administrative determination is made that respondents "will not pose a danger to the safety of other persons or to property." 8 U.S.C. 1226(e)(3)(C) (1994); see Pet. App. 85a-87a. Respondents do not contend otherwise. In that event, moreover, the second question in the petition, which involves the constitutionality of statutorily authorized detention, would be directly presented.

In addition, if the Court did determine that former Section 1226(e) applies to respondents, that determination would directly affect a large number of aliens. Most of the detained Mariel Cubans who cannot be returned to Cuba were, like respondents, placed in exclusion proceedings under the pre-

1996 immigration laws. A determination about the permissibility of detaining hundreds of Mariel Cubans now in detention (see Pet. 27-28)—and other aliens (including other Mariel Cubans) who were placed in exclusion proceedings before IIRIRA's effective date, but who cannot be removed to their home country—would have great practical importance.[1]

3. Respondents next suggest (Br. in Opp. 12-14) that this Court's review of the statutory and constitutional issues presented in the petition should be deferred until they arise in another case, because these cases may in the future present a question of mootness. Respondents, however, have consistently argued that their release on conditions of parole would *not* moot these cases. The court of appeals agreed, Pet. App. 11a-17a, noting, *inter alia*, that under the governing regulations, parole may be revoked at any time in the public interest, whether or not the alien has violated the conditions of his parole. See *id.* at 13a-14a & n.7.

No mootness issue will even arise in this Court unless (1) respondent Carballo successfully completes a halfway-house drug-treatment program, which is not expected before September 2003 at the earliest (Pet. 11-12), and (2) respondent Rosales-Garcia remains on parole at that time. Respondents' argument against certiorari therefore is based on the speculative possibility that—under a mootness theory with which respondents disagree—a "question of mootness" (Br. in Opp. 12) might arise in the future.

The mootness question that would arise if both respondents are paroled was presented to and decided by the court

---

[1] The number of Mariel Cubans detained for more than six months, and the identities of those individuals, are not static. On an ongoing basis, Mariel Cubans are paroled from detention pursuant to 8 C.F.R. 212.12, and returned to detention following any revocations of parole. Therefore, the number of Mariel Cubans in immigration detention for a continuous period of more than six months will not necessarily decrease in the foreseeable future.

of appeals and would itself be deserving of this Court's review. See Pet. 29 n.8. Furthermore, if a mootness question does arise before the Court renders its decision on the merits, the question could be addressed in supplemental briefs. See Sup. Ct. R. 25.5; see also, *e.g.*, *National Park Hospitality Ass'n* v. *Department of the Interior*, No. 02-196 (May 27, 2003), slip op. 4 (noting that Court ordered supplemental briefing on ripeness issue after oral argument).

No other case provides a ready vehicle for this Court's review. *Borrero*, which respondents propose as an alternative vehicle (Br. in Opp. 13 n.8), was decided in favor of the government, and it cannot be known whether the alien would file a certiorari petition if the Eighth Circuit denied his pending petition for rehearing en banc (especially if this Court had denied the instant petition for certiorari). None of the pending Sixth and Ninth Circuit appeals on which respondents rely (Br. in Opp. 14 n.8) has been briefed. Moreover, a potential mootness issue exists in *any* case involving an alien detained pursuant to 8 C.F.R. 212.12 (Mariel Cubans) or 8 C.F.R. 241.4 (other inadmissible aliens), because the detention regulations require annual custody reviews that could lead to the alien's release from physical detention. See Pet. 26.

4. Respondents dispute that the Sixth and Ninth Circuits' extension of *Zadvydas*'s "reasonable time" limitation is important. See Br. in Opp. 16-19. Respondents' principal point is that the government did not seek this Court's review of the Ninth Circuit's decision in *Xi*. The time for filing a certiorari petition in *Xi* expired, after two extensions, on February 24, 2003. On that date: (1) these consolidated cases were pending in the Sixth Circuit after this Court's December 2001 remand order in *Rosales-Garcia*; (2) the Fifth Circuit had not yet designated *Rios* for publication; and (3) *Borrero* was pending in the Eighth Circuit. The government's decision to await the expected decisions in

those cases only serves to highlight the strong grounds—which now include a direct circuit split *as well as* an issue of great inherent importance—for granting the instant petition.

Respondents also dispute (Br. in Opp. 17-18) that the Sixth and Ninth Circuits have required the release of dangerous aliens. Yet those courts have overridden detention regulations that provide for the release of only nonviolent and non-dangerous aliens. See 8 C.F.R. 212.12(d)(2), 241.4(e). Those excludable and inadmissible aliens who remain in custody, even though they cannot be removed to their home countries, have been determined to be ineligible for release under those criteria. Respondents' extensive criminal histories (see Pet. 5-6, 11) are characteristic of those Mariel Cubans who presently are in immigration detention.

Respondents' observation that *Zadvydas* itself requires the release of some dangerous criminal aliens into the community (Br. in Opp. 17-18) is hardly a persuasive argument for extending *Zadvydas*, and misses the point. As this Court emphasized in *Zadvydas*, and as the certiorari petition explains (see Pet. 21-25), there is a world of difference between a judicial order that limits the detention of an alien who was admitted into the United States as a lawful permanent resident, and a judicial order that directs the release into the community of an alien who was stopped at the border and who has been determined by the political Branches, in the exercise of their plenary immigration powers, *not* be suitable for admission or release into the United States.[2]

---

[2] The INS's discretionary decision to include aliens who entered this country illegally within the scope of its administrative rule implementing *Zadvydas* (see 8 C.F.R. 241.13, discussed at Br. in Opp. 19, 21-22), was not compelled by Section 1231(a)(6), the *Zadvydas* decision, or the Constitution. That decision is, however, consistent with the Court's cases identifying a difference between aliens who are stopped at the border and denied admission to the United States, and aliens who accomplish entry into the United States. See *Zadvydas*, 533 U.S. at 693; *Mezei*, 345 U.S. at 210-213. Consistent with the government's position in the instant cases,

5. In addition to its incorrect extension of *Zadvydas*, the court of appeals' alternative holding was that a six-month presumption like the rule of *Zadvydas* should be inferred, under the canon of constitutional avoidance, because "the indefinite detention of excludable aliens raises the same [due process] concerns * * * as the indefinite detention of aliens who have entered the United States." Pet. App. 43a. As the petition explains (Pet. 28-29), that alternative holding conflicts with the unanimous view of other circuits, and with this Court's decisions in cases such as *Zadvydas* and *Mezei*.

Respondents contend that the Sixth Circuit's constitutionally based holding, which is presented in the second question in the petition, is not suitable for this Court's review because, being an alternative holding, it did not "determine the outcome" below. But as the petition notes (Pet. 28 n.7), alternative holdings by a court of appeals are each reviewable in this Court, and this Court would need to consider both of the Sixth Circuit's rationales in order to reverse the judgment below. Indeed, the Sixth Circuit's constitutionally based holding is especially misguided, because it denies what this Court has long viewed as a "critical" constitutional and statutory difference "between an alien who has effected an entry into the United States and one who has never entered." *Zadvydas*, 533 U.S. at 693.

6. On the merits, respondents err in contending (Br. in Opp. 22) that to sustain their detention necessarily would require that Section 1231(a)(6) be "interpreted differently for deportable and inadmissible aliens." Respondents ignore the petition's demonstration (Pet. 23-25) that their detention is consistent with *Zadvydas*'s limitation on Section 1231(a)(6), because it "bears a reasonable relation to the purpose" of their detention, namely to maintain the physical

---

the post-*Zadvydas* regulation does *not* apply to arriving aliens who are stopped at the border. See 8 C.F.R. 241.13(b)(3)(i); 66 Fed. Reg. 56,969 (2001).

exclusion of respondents from the United States. *Zadvydas*, 533 U.S. at 690 (internal brackets and citation omitted).

Insofar as respondents contend that Section 1231(a)(6), as construed in *Zadvydas*, "imposes a presumptive six-month limit" on post-final-order detention (Br. in Opp. 20), both Section 1231(a)(6) and *Zadvydas* are plainly to the contrary. Nothing in Section 1231(a) could be construed to impose such a presumption, and *Zadvydas* makes clear that its six-month presumption is not a statutory requirement, but rather a "practical[] necess[ity]" for judicial administration of the more general "reasonable time" limitation that the Court construed Section 1231(a)(6) to contain in the context of aliens who previously had been admitted for lawful permanent residence. 533 U.S. at 682, 701.[3]

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JUNE 2003

---

[3] There is no inconsistency between respondents' detention and 8 U.S.C. 1226a. See Br. in Opp. 22. Section 1226a authorizes, *inter alia*, detention of specified aliens beyond the 90-day removal period in six-month increments "if the release of the alien will threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. 1226a(a)(6). Section 1226a is *not* limited to aliens, like respondents, who were stopped at the border and denied admission to the United States; its provisions, which were enacted after *Zadvydas*, also apply to previously admitted aliens like those in *Zadvydas*. Furthermore, much as Section 1226a contemplates periodic detention reviews, respondents have been afforded annual custody reviews under 8 C.F.R. 212.12.